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No. 85-1835

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

STATE OF CALIFORNIA,

Petitioner,

v.

PETER ROONEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The California Public Defenders Association is a statewide organization of publicly-employed defense attorneys. As legal representatives for the indigent accused these attorneys are responsible for insuring that

their clients' constitutional rights are fully protected. No such right is more precious than the right to privacy and freedom against unreasonable searches and seizures by the government which is embodied in the Fourth Amendment to the United States Constitution. This organization has a profound interest in the important question litigated herein, i.e., whether there is a reasonable expectation of privacy in contents placed in a communal trashbin located in a subterranean garage to an apartment complex. Resolution of this question would likely affect numerous cases routinely handled by deputy public defenders across California.

This brief does not repeat any arguments advanced on behalf of respondent Rooney by his learned counsel, but instead focuses on the operation of substantive state law on defining the scope of a reasonable expectation of privacy under the Fourth Amendment. Consent to the filing of this amicus brief has been obtained from counsel for petitioner and respondent, whose letters to that effect are being filed under separate cover concurrently with the brief.

SUMMARY OF ARGUMENT

It is beyond question that at least since Katz v. United States, 389 U.S. 347 (1967), the scope of the Fourth Amendment is defined in terms of expectations of privacy. Legal definitions and concepts of privacy have historically been associated with state law. Should not state law (to the extent there is such law) be relevant to and perhaps determinative of the question of whether a reasonable expectation of privacy exists in a given situation?

Amicus curiae contends herein that California decisional law on the subject of expectations of privacy in trash containers is relevant to the question of whether a California resident has a reasonable expectation of privacy in trash containers under the Fourth Amendment. Pursuant to ample precedent from this Court, this decisional law should control the primary question litigated herein.

The main response to the above-proposed contention is likely to be based on the "Truth-in-Evidence" provision of the state constitution, enacted by the voters through the initiative and

referendum process, which states in pertinent part: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceedings . . . " (Cal. Const., art I, § 28(d).) Of course the literal language of this provision would mandate that any evidence tainted by a violation of the Fourth Amendment, no matter how egregiously, would nonetheless be admissible at trial if relevant.

It is recognized by all parties in California, however, that the truth-in-evidence provision is necessarily limited by substantive rulings from this Court on the Fourth Amendment, and that an individual's federal constitutional rights cannot be abrogated by the voters using the initiative and referendum process in a state election. The asserted purpose of the truth-in-evidence provision is to conform California law regarding the exclusionary rule to the precise boundaries of substantive Fourth Amendment law as interpreted by this Court. However, the critical point which will be emphasized by amicus herein is that the voters of California did not repeal the independent

provisions of the California Constitution which grant citizens of California privacy expectations greater than that recognized by this Court. The only effect of the law adopted in California was to provide that evidence could not be suppressed under the California Constitution, even though it was illegally seized under that Constitution, or even the federal Constitution. Thus, in the instant case, whether or not the evidence seized is suppressed, it is unquestionable that the seizure was illegal under California Constitutional law.

The question thus presented is whether the federal Constitution will protect the manifestly reasonable privacy expectations of State citizens guaranteed by State Constitutions when the State does not itself authorize suppression of evidence as a sanction for illegal conduct. This is a unique question of first impression to this Court. To amicus' knowledge, there is no other state in the union which recognizes the doctrine of "independent state grounds" to determine the legality of a search or seizure, yet does not require

the suppression of evidence determined to have been illegally seized under state law. The issue that amicus accordingly presents for this Court's resolution is this:

"If evidence is illegally seized in violation of State law and in violation of a State citizen's reasonable expectation of privacy recognized by State law, is suppression of that evidence mandated under the Fourth Amendment to the United States Constitution?"

ARGUMENT

I

THIS COURT HAS PREVIOUSLY LOOKED TO STATE LAW TO DETERMINE THE SCOPE OF A RIGHT PROTECTED UNDER THE FEDERAL CONSTITUTION AND SHOULD DO SO IN DETERMINING IF RESPONDENT HAD A REASONABLE EXPECTATION OF PRIVACY IN THE TRASH BIN IN HIS GARAGE

This Court recognized in Katz v. United States, supra, that the laws of the individual states were responsible for the protection of a person's general right to privacy, that right existing aside from any federal constitutional right:

> "The protection of a person's general right to privacy — his right to be left alone by other people —is, like the protection of his property and of his very life, left largely to the law of the individual states." (389 U.S. at pp. 150-151.)

It is recognized that not only "general" privacy law, but substantive Fourth Amendment law which defines reasonable expectations of privacy, is also necessarily grounded in state law. Thus it was stated in Rakas v. Illinois, 439 U.S. 128 (1978):

> [I]t would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in

> criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." (Id., at pp. 143-144, fn. 12.)

The Court's reference to property law in conjunction with society's "understandings" points to state law as the logical source for such law because property law is viewed as a preserve of the states. As was noted in Board of Regents v. Roth, 408 U.S. 564, 577 (1972):

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."

In the area of procedural due process this Court has recognized the role that state law plays in defining federal constitutional protections. Thus in Board of Regents v. Roth, supra, 408 U.S. 564, it was held that non-tenured teachers at a state university did not have a protectable "property" interest in continued employment sufficient to guarantee them various procedural protections prior to their termination because the applicable state law had not created a "legitimate claim of entitlement." (Id., at p. 577.)

In Paul v. Davis, 424 U.S. 693 (1976), this Court noted that defining "liberty" interests for purposes of the Due Process Clause was as difficult as defining "property" interests. The Court stated: "[T]hese interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law." (Id., at p. 710.) Davis went on to hold that because the asserted defamation did not involve interference with a more "tangible" interest created by state law, the petitioner did not have a "liberty" interest in avoiding governmental defamation. (Id., at p. 707.)

It is also significant that in the area of First Amendment obscenity law, where the first step in determining the scope of a constitutional right is to determine whether the material in question is "obscene", the factfinder is required to apply local or state standards, because there is not a definition which is covered solely by reference to the First Amendment. (Roth v. United States, 354 U.S. 476, 485 (1975); Miller v. California 413 U.S. 15, 30 (1973).)

This Court has often specifically referred to state law to determine the validity of arrests made by state and federal officers. (Ker v. California, 374 U.S. 23, 37 (1963); Miller v. United States, 357 U.S. 301, 305-306 (1958); Johnson v. United States, 33 U.S. 10, 15; United States v. Di Re, 332 U.S. 581, 589.) There is thus ample precedent to support the proposition advanced herein, that the scope of one's expectation of privacy in his discarded trash may be defined by reference to relevant state law on the subject. Thus if the State of California has through legislative or decisional law made a specific determination that a particular privacy expectation is reasonable, and such

authority is clear and easily discernible, this should control the question of what is a reasonable expectation of privacy under the Fourth Amendment in California.

In California it has been the law since People v. Krivda, 5 Cal.3d 357 (1971), reaffirmed under the same name at 8 Cal.3d 623 (1973), that under the California Constitution a citizen of California does indeed have a reasonable expectation of privacy in the contents of a trash container placed outside the premises for collection, at least from the snooping eyes and hands of law enforcement officers. This ruling was applied in the instant case (People v. Rooney, 175 Cal.App.3d 634 (1985)), and most recently in People v. Greenwood, 182 Cal.App.3d 729 (1986). Californians thus have a broad, and reasonable, privacy expectation which is specifically included as an inalienable right in the California Constitution. (Cal. Const., art. I, § 1.) Under these authorities Californians reasonably expect that the contents of their trash containers, which may be taken by garbage collectors for purposes of disposal, remain immune from warrantless inspection by law enforcement officers seeking evidence of criminal activity. Firmly

grounded in precedent by the state's highest court, this expectation of privacy should be protected by the Fourth Amendment as it applies in California.

II

ENACTMENT BY THE VOTERS OF THE "TRUTH-IN-EVIDENCE" PROVISION OF THE STATE CONSTITUTION DID NOT ABROGATE CALIFORNIANS' REASONABLE EXPECTATION OF PRIVACY AND CANNOT DIMINISH THEIR PROTECTION UNDER THE FOURTH AMENDMENT

By passage of the popularly-called "Proposition 8", the electorate approved the following amendment to the California State Constitution:

"Right to Truth-in-Evidence.

Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether

heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press." (Cal. Const., Art. I, § 28, subd. (d).)

From its very terms it is clear that this provision does not purport to rescind any federal or state constitutional protections. There is no mention at all of the Fourth Amendment, unreasonable searches and seizures, or of any right to privacy. Indeed it has been held that the substantive portions of the state constitution which guarantee Californians freedom from unreasonable searches and seizures (Cal. Const., Art. I, § 13) were not repealed by enactment of the truth-in-evidence provision. (In re Lance W., 37 Cal.3d 873, 886 (1985).) The California Supreme Court ruled that the effect of the provision was only to preclude state courts from excluding evidence seized in violation of the state or federal Constitutions unless exclusion is compelled by the federal Constitution. (Id., at pp. 888-890.)

In the instant case exclusion of the evidence seized from the communal trash bin is compelled by the Fourth Amendment to the federal Constitution, and state law defining Californians' reasonable expectation of privacy does not compel the exclusion of evidence of its own force, but merely aids in interpreting the scope of the Fourth Amendment in California. Accordingly, it is the exclusionary rule fashioned by this Court, made applicable to the states by Mapp v. Ohio, 367 U.S. 643 (1961), which operates to bar the seized evidence. Pursuant to the Supremacy Clause of the federal Constitution (U.S. Const., Art. VI, cl. 2), this federal rule of exclusion may not be undermined by any action on the part of the state.

The question as it arises in this case concerns a warrantless search which was illegal as being in violation of the California Constitution and the reasonable privacy expectations of California citizens by the courts of California as protected by that Constitution. However, the question could just as easily be presented as one of substantive statutory law. For example, there is certainly no federal constitutional

compulsion behind the requirement in California statutory law that warrantless arrests for misdemeanor can (with limited exceptions) only be made by a peace officer who has observed the offense. (Cal. Pen. Code § 836, subd. 1.) However, it is certain that under Ker v. California, supra, 374 U.S. 23, any evidence seized as the result of an arrest which was illegal under this substantive law would be suppressed by virtue of the requirements of the Fourth Amendment, even though California law does not provide suppression as a sanction for such illegal conduct. The rule should be no different when it is State constitutional privacy guarantees which are involved. If the State has provided privacy guarantees to its citizens, then those guarantees must be enforceable under the Fourth Amendment. The police conduct in this case was no less illegal because the voters of California have eliminated suppression of evidence as a sanction. This Court must accordingly provide the protection against such illegal police conduct which is inherent in the guarantees of the United States Constitution and the Fourth Amendment.

CONCLUSION

It is clear that a citizen of California has a reasonable expectation of privacy in items placed in a trash receptacle for disposal, since such a privacy expectation is specifically guaranteed by State law. The Fourth Amendment must protect such reasonable expectations of privacy, even if they are not protected by the State which has established the privacy right. For this reason, respondent's expectation of privacy in the contents he placed into the trash container in his subterranean garage must be viewed as reasonable within the meaning of the Fourth Amendment, and the decision of the California Court of Appeal should be affirmed.

Respectfully submitted,

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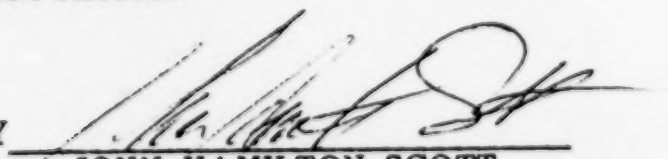
BY 
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